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ACTS OF CONGRESS.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 200.

THE UNITED STATES, *Appellant*,

vs.

ROBERT A. LAUGHLIN.

BRIEF FOR APPELLEE.

STATEMENT.

This case comes before the court upon the appeal of the United States from the judgment of the Court of Claims in favor of the appellee that he have and recover from the United States the sum of $200, the same being adjudged an excess payment required of him in completing title to a tract of public land under the preemption law.

The Court of Claims made the following:

FINDINGS OF FACT.

I.

On November 20, 1878, claimant made Preemption Cash Entry No. 106, at the United States Land Office at The Dalles, Oregon, for a tract of public land containing 160 acres and described as the south half of the northwest quarter and the north half of the southwest quarter of Section 33, Township 5 south, range 12 east, for which he was charged by the proper officer of the United States the sum of $400, or at the rate of $2.50 per acre.

II.

The land entered by claimant is a part of an odd-numbered section within 40 miles of the general route of the Northern Pacific Railroad Company, as shown by the map of said general route filed in the Interior Department on August 13, 1870.

On February 14, 1872, the Interior Department issued an order withholding from disposition the odd-numbered sections of public lands within the limits indicated by said map of general route and increasing in price to $2.50 an acre the even-numbered sections within said limits.

III.

No map of definite location of that portion of the proposed road of the Northern Pacific Railroad Company opposite claimant's land was ever filed; the road opposite thereto was never constructed, and the grant as to it was forfeited by the act of Congress of September 29, 1890 (26 Stat., 496).

IV.

Claimant applied to the Secretary of the Interior under the act of March 26, 1908 (35 Stat., 48), for the refund of

$200 of the purchase money paid by him for said land, alleging that the lawful price thereof was $1.25 per acre; but the Secretary of the Interior, on July 22, 1916, denied said application on the ground that the questions of law presented by claimant had been previously adjudicated by the Interior Department adversely to his contentions."

The case therefore presents only the question of law based on these facts.

THE STATUTES INVOLVED.

By section 3 of the act of July 2, 1864 (13 Stats., 365), a grant was made in aid of the construction of the Northern Pacific Railroad of "every section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, etc."

By section 6 of said granting act it was provided:

> "and the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

Section 2 of the act of June 16, 1880 (21 Stat., 287), provided:

> "In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or

> where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns."

By Section 2 of the act of March 26, 1908 (35 Stats., 48), it was provided:

> "That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public-land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives."

The Appeal.

In the Court of Claims no demurrer, answer, counterclaim, set-off or other formal defense in the premises was entered on behalf of the United States. Therefore, a general traverse was entered as provided for by Rule 34 of that court. (See page 5 of the record.) Neither was there any question raised in the Court of Claims as to its jurisdiction, so that no such question was considered by that court in this case.

In another case pending about the same time before the

Court of Claims, known as the case of Charles H. Maginnis vs. United States (52 Ct. Cls., 271), a question of jurisdiction was raised, it being contended that Section 2 of the act of March 26, 1908, *supra*, vested jurisdiction exclusively with the Interior Department in the matter of excess payments, but the court overruled the contention on behalf of the Government, holding that an action would lie in that court for collection of the excess under its general jurisdiction over "all claims founded upon any law of Congress." In this regard it was said:

A question of jurisdiction under the repayment act of March 26, 1908, *supra*, first confronts us. The defendants raise the issue, predicating their contention upon the theory of a legislation intention apparent from the language of the act of 1908 to grant both the right and remedy exclusively to the Secretary of the Interior. The act of March 26, 1908, is in the following language:

> "SECTION 1. That where purchase moneys and commissions paid under any public-land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application.
>
> "SEC. 2. That in all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public-land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives.

"SEC. 3. That when the Commissioner of the General Land Office shall ascertain the amount of any excess moneys, purchase moneys, or commissions in any case where repayment is authorized by this statute, the Secretary of the Interior shall at once certify such amounts to the Secretary of the Treasury, who is hereby authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and issue his warrant in settlement thereof."

The conclusiveness of the defense necessarily depends upon the ability of the defendants to distinguish this case from the leading case of *Medbury v. United States*, 173 U. S., 492, followed by this court in a long line of decisions, all of which have been quite recently reviewed by the Chief Justice in *Neaccomber v. United States*, 51 C. Cls., 408.

It is conceded that under the first section of the statute this court has jurisdiction to enforce repayment of the purchase moneys and commissions mentioned therein, and thereby review the action of the department with reference thereto. *Billings v. United States*, 50 C. Cls., 328. The marked and precise difference between section 1 and section 2 of the law is said to be in the use of the words, "*in all cases where it shall appear to the satisfaction of the Secretary of the Interior*," such excess shall be repaid, etc.

If by the use of the above language it was intended to lodge in the Secretary of the Interior the exclusive jurisdiction to determine the question of repayment of excessive amounts exacted under the public-land laws, it can not be gainsaid, in view of repeated decisions of the Supreme Court, that this court is without jurisdiction to proceed. While it is difficult to perceive any rational legislative reason for a remedy in this court under section one of the law and a positive denial of the same proceeding under section two thereof, nevertheless we must look to the statute, for by its provisions the right and remedy are governed.

It is indisputably certain that section two of the stat-

ute creates a right to a repayment of any amounts in excess of the legal requirements of the public-land laws, so that we are now alone concerned with the remedy afforded, for, as said by this court in the *Newcomber case, supra*, "The underlying principle deducible from the cases is that a claimant entitled to a right by virtue of an act of Congress is also entitled to a remedy for its enforcement."

Taking the statute as a whole, its obvious intent is to repay any illegal exaction of fees in connection with entry of public lands, as well as to repay fees legally exacted in cases where certain entries are rejected for causes other than fraud, and the mode of ascertaining the fact is left with the department having jurisdiction of the general subject. While the first section does not expressly designate the official upon whom the duty rests to determine the question of a "rejection," nevertheless it is apparent that the Department of the Interior is charged with this duty, and that the issue as to whether a land entry has been "rejected" or "canceled," as well as the question of fraud, must be determined to the "satisfaction" of the department before the repayment will be authorized, and the final authority in the department rests in the Secretary of the Interior. The practical operation and effect of the two sections are similar in every respect, although the verbiage is distinct. The second section of the act of June 16, 1880, 21 Stats., 287, says "the Secretary of the Interior shall cause to be repaid to the persons who made such entry," etc., and the Supreme Court in the *Medbury case*, addressing itself to this law, said:

"We can not now suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the Court of Claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed, and when the application is erroneously refused the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right."

The second section of the act of 1880 required an investigation of the facts and the application of the law thereto by the Secretary; his judgment (we may well say his "satisfaction") must be fully appeased before the claimant could avail himself of the provisions of the statute. The act of 1880 was no less mandatory than the act of 1908. Each required a distinct *procedure;* and when the undisputed facts had been laid before the Secretary nothing remained to be done except a correct application of existing law thereto. The facts determined the legal questions, and if the facts were in accord with the statute, the *right* granted by the statute vested and repayment must be made. The *granted right* was the paramount intendment of the law; the procedure for its enforcement was preliminarily lodged in the Secretary of the Interior, and if, as in a case similar to this, claimant is denied the privileges of the grant through the error or failure to act upon the part of the Secretary, he may assert that right by a proper suit in this court under our general jurisdiction. It is a right granted under a law of Congress providing for a detailed and specific procedure which must in the first instance be determined by the Secretary, but it is none the less a legal right capable of enforcement in this tribunal if upon the facts found the Secretary should have misapplied the statute. Innumerable instances of statutes similar in most respects have been before the court and almost without exception jurisdiction has been taken thereunder and the case heard. Any other conclusion would leave a statutory right granted to a citizen without an adequate and complete relief for its infringement. Mr. Justice Peckham in the *Medbury case* makes this clear and distinct in the following quotation: "If there were any disputed questions of fact before the Secretary, his decision in regard to these matters would probably be conclusive, and would not be reviewed in any court. But where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make

the payment is not final, and the Court of Claims has jurisdiction of such a case."

The act of 1908 creates a special right, it imposes upon the Secretary of the Interior the correct administration of the law, and if he fails in this respect there is a remedy provided in the act of Congress conferring jurisdiction upon this court in clear and definite language in the matter of "all claims founded upon any law of Congress."

The decisions of the Supreme Court and this court in reference to the subject matter are set forth in the margin.[1]

An examination of the cases wherein remedial acts and exclusive remedies have been combined in the same statute forcibly emphasize the position that the congressional intention so to do is made free from doubt by the express language of the act and its specific details. In *Nichols* v. *United States, 7* Wall., 122, a case involving the revenue laws of the Government, it was apparent upon the face of the legislation, not only from the express method pointed out to secure a refund of alleged illegal payments of import duties but from the context of the whole body of revenue legislation, that the Congress designed the establishment of a system complete in detail to meet the emergencies of the collection of the Government's revenues and provide an especial and exclusive method of obtaining redress upon allegations of any illegal exactions. The importance of such a system was fully pointed out by the court, the reasons why this especial governmental function should not be hampered and disturbed by the general demands of claimants was distinctly set forth, and for these reasons a narrow channel of preliminary procedure was provided, compliance with which entitled the claimant to pursue his remedy against a named officer of the Gov-

[1] *Sampson's case*, 35 C. Cls., 578; *Commonwealth Ins. Co.* v. *United States*, 37 C. Cls., 532; *Sowle's case*, 38 C. Cls., 525; *Sanderson's case*, 41 C. Cls., 230; *McLean's case*, 45 C. Cls., 95; 226 U. S., 374; *Medbury's case*, 173 U. S., 492; *Kaufman's case*, 11 C. Cls., 659; 96 U. S., 567; *United States v. Savings Bank*, 104 U. S., 728; *Hvoslef's case*, 237 U. S., 1; *United States* v. *Emery*, 237 U. S., 28; *Pursell's case*, 46 C. Cls., 509; *Olin R. Booth's case*, 51 C. Cls., 483; *United States ex rel. Parish* v. *McVeagh*, 214 U. S., 124.

ernment in the courts of the country. This was obviously exclusive; it was intended to confer this individual right and provide for its enforcement in this exclusive way.

The act discussed in the *Nichols case* granted a resort to a Federal court and designated an officer of the Government against whom suit must be brought. Surely it is not to be presumed, in the absence of a definite and certain intention to the contrary, that rights created by an act of Congress are to be exclusively adjudicated and determined by a department other than the judicial branch of the Government. As well said in the *Newcomber case*, quoting from the *Emery case*, "Indeed the suggestion is plain in the *Emery case* that the premise 'that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye,' is an inadmissible one."

* * * * * * * * * *

In the Maginnis case, judgment was rendered in favor of the United States upon the merits and the case terminated with the decision of that court.

When appeal was taken from the judgment of the Court of Claims in favor of appellee Laughlin, there was no specification of error, but in the tentative brief furnished counsel for appellee on Friday, January 24, 1919, it is urged first, that the lower court has no jurisdiction of the subject-matter of this suit, and second, that the fees and commissions paid by appellant were lawfully demanded and collected.

In support of the first contention, the brief urges that the Court of Claims had no jurisdiction of the subject-matter of this suit, and in this connection it is said:

> "In the case of *United States* v. *Edmonston* (181 U. S., 500), it was held that, in the statutes conferring jurisdiction on the Court of Claims, Congress did not intend to acknowledge the liability of the Government to every individual who had voluntarily paid to any

> one of its officers a sum in excess of the legal charge for property or services and did not give that court the power to render judgment against it for such excess. There is nothing in the present record to show anything tantamount to objection and protest made at the time the fees and commissions were paid."

In replying to this suggestion, we call attention to the fact that the Edmondston case involved a claim to refund of an excess payment based upon the fact that while the lands purchased had been originally rated at $2.50 per acre, Congress had, by the Act of June 15, 1880 (21 Stats., 237) reduced the price of such land to $1.25 per acre, and that the claimant had made purchase after the price had been reduced, but was required by the land officers to make payment at the higher rate of $2.50 per acre.

There was no question but that the payment made in that case was in excess of that that should have been required, but there had been no law of Congress authorizing or directing a repayment of the excess in such cases. Neither was there any protest or objection at the time the payment was made, the claimed right to the refund resting on an implied contract because the payment was excessive, and under those circumstances the court denied the claim to an implied contract and treated the payment as a voluntary payment, holding that the Court of Claims was not invested with jurisdiction to hear and determine all matters of excessive payments. In this connection it was said in the opinion at pages 513-514:

> "That Congress has power in all cases to waive the question of voluntary payment and provide that any mistake shall be corrected and any excess of payment refunded by the officer receiving it, or recovered by an action in the Court of Claims, is undoubted; that, as shown by these references, it has made provision in

certain cases for a refunding by the department which has received the money is obvious; and provided for such refunding irrespective of the question of voluntary payment. Now, counsel would draw the inference that the question of voluntary payment has been waived by Congress in all cases of transactions between the Government through its administrative officers and private individuals except in customs cases, and if there be no specific provision for refunding by the department in which the mistake has occurred, the party may come into the Court of Claims and enforce his right to recover. Our conclusion is directly to the contrary, and that Congress, recognizing the rule of voluntary payment, believed that in certain instances it ought not to be enforced, and that the department which received money in excess of the legal charge or price should refund, and so legislated, intending to leave all other cases subject to express statutory requirement of protest or to the ordinary and well-established rule as to the effect of voluntary payment."

In this connection, we call the court's attention to the fact that after its decision in the Edmonston case, a bill was introduced in the 59th Congress, 2d Session, to meet the delinquencies in the law as set forth in the decision of this court in that case. The bill as introduced, known as H. R. 22588, 59th Congress, 2d Session, provided for amendment of the second section of the repayment act of June 16, 1880, so as to specifically provide for repayment of any excess payment (See H. R. Report 7290, 59th Congress, 2d Session), but the form of the bill was later changed, and instead of amending the act of 1880, the bill as passed March 2, ~~1887~~ 1907, provided:

"That in all cases in which homestead entryman upon final proof or commutation shall have been required to pay more than the lawful purchase money for their lands, the Secretary of the Interior shall cause the

excess to be repaid to the entryman or to his heirs or assigns (34 Stats., 1248)."

It was said in the House Report on said bill:

"In the administration of our public-land laws it is unavoidable that some mistakes should be made by the officers of the Government, and that in many instances money should be paid into the Treasury of the United States for the public lands in excess of the legal amount due therefor. It has always been the policy of the Government to return to the persons entitled thereto such amounts as have been paid into the Federal Treasury by mistake. However, when money is once paid into the Treasury it can be disbursed only under specific Congressional authority. For this purpose an act was passed January 12, 1825 (Rev. Stat., Secs. 2362-2363), which provided for the refundment of purchase money when the Government could not convey title to the land entered, and by the act of June 16, 1880 (21 Stat. L., 287), this character of relief was extended to include the return of fees and commissions on homestead entries that could not be confirmed and of the illegal excess where double minimum price had been paid for lands afterwards found not to be within any railroad land grant.

"The effect of these laws is to exclude from their beneficial operation all cases not specifically included therein (just as held in the Edmonston case). As a result there is a large class of cases where by mistake the local officers have collected more than the lawful fees or purchase money on valid entries, or where illegal amounts have been collected by such officers through misinterpretation of the laws or instructions or by clerical error. There is no principle of equity or good conscience by which the Government can retain moneys which have been paid into the Treasury under these circumstances, and yet as the law now stands there is no authority for returning such funds to the persons entitled thereto. The purpose of the present

bill is to provide for repayment in cases of this character.

"The present bill is identical with Section 2 of the act of 1880, except in lines 6, 7, and 8, on page 2 of the bill, where it is provided that repayment may be had in all cases where parties have been 'required to pay more than the lawful fees, commissions, excesses, or purchase money.' This is the only amendment in the law as it now stands, and it is believed that this provision will meet all meritorious cases not already included under the law.

"The passage of this bill is recommended by the Honorable Secretary of the Interior, and the Honorable Commissioner of the General Land Office, whose communications thereon are attached as a part of this report."

This was undoubtedly a waiver on the part of Congress of any objection to excess payments, on the ground that the same was paid voluntarily, but the difficulty with this law was that it made no appropriation for meeting the claims thus recognized.

On Jan. 14, 1908, the then Secretary of the Interior, Mr. James Rudolph Garfield, addressed the following communication to the Chairman of the Committee on Public Lands of the House of Representatives:

"Department of the Interior,
Washington, January 14, 1908.

"Sir: The act of March 2, 1907 (34 Stats., 1248), authorizes the repayment in cases where homestead entrymen had made payments in excess of the amounts required by law. This act was defective in that its operation was limited to homestead entrymen and it was entirely inoperative because it contained no provisions as to the fund or appropriation from which repayment should be made.

"There are a large number of cases in which, owing to the change in the construction of the law with rela-

tion to the double minimum lands, excesses have been collected and under the present law can not be repaid.

"I therefore herewith submit a proposed bill authorizing repayment in such cases and respectfully recommend that it be enacted into a law.

JAMES RUDOLPH GARFIELD,
Secretary.

The same day, he called to the attention of the same Committee the difficulty arising through the absence of provision for the return of moneys deposited with applications and proofs finally covered into the Treasury where the same were ultimately rejected, his communication in that regard being as follows:

"Department of the Interior,
Washington, January 14, 1908.

"Sir: Heretofore and until recently all moneys deposited with applications and proofs for public lands have been retained temporarily by the receivers of public moneys at the United States land offices and finally covered into the Treasury when the entries were allowed or returned by the receivers to the applicants in case their applications and proofs are rejected.

"The fact that these moneys accumulated in the hands of the receivers largely in excess of their bonded liability called for a change in this practice, and to safeguard these funds all moneys of this kind are now and will hereafter be covered into the Treasury as soon as they are received. Under the existing law there is no means of withdrawing any of these moneys from the Treasury for repayment to the persons whose applications and proofs are finally rejected, and I, therefore, herewith submit a proposed bill authorizing their repayment and recommend that it be enacted into a law.

Very respectfully,
JAMES RUDOLPH GARFIELD,
Secretary."

Separate bills were introduced in the 60th Congress, 1st Session, providing for repayment to meet these two conditions, known as H. R. 14018 and H. R. 14027. Later, the two bills referred to were consolidated and became the first and second sections of the Act of March 26, 1908.

With this history it must be apparent that these several pieces of legislation regarding repayment of moneys erroneously or improperly collected, are part of one general scheme, and that there was no attempt to differentiate between the several classes or grant variant rights to the several claimants. In other words, the Act of 1908 was intended to supplement the repayment act of 1880.

The use of the expression in Section 2 of the Act of 1908, namely, "where it shall appear to the satisfaction of the Secretary of the Interior," did not mean to relegate the claim to the judgment of the Secretary alone where the question of the excess was purely one of law. The use of the expression added nothing to the right, as the administration of all of the land laws are primarily with the Secretary of the Interior.

Neither did it mean to limit the right any more than did the expression used with regard to indemnity in the different railroad grants requiring approval of such selections by that officer. On questions of fact in cases growing out of the public land laws, the determination of the Secretary of the Interior is final, but it has never been held where there are no disputed questions of fact, and his determination rests alone upon one of law, that the same is not open to review in the courts.

In concluding this feature of the case we say that the decision of this court in the Medbury case fully disposes of any question as to the court's jurisdiction here. In that case the claimed right of repayment was under Section 2 of the Act of June 16, 1880, *supra*. The Court of Claims

held that it had no jurisdiction for the reason that the remedy afforded by the Act of 1880 to obtain the repayment of the excess price was exclusive of any other. In disposing of this matter this court said at page 497 of the opinion:

> "Although the right to recover back the excess of payment in this proceeding is based upon the statute of 1880, we do not think it comes within the principle of those cases which hold that where a liability and a remedy are created by the same statute, the remedy thus provided is special and exclusive. In this case it is not a right and a remedy created by the same statute. The statute creates the right to have repayment under the facts therein stated, but it gives no remedy for a refusal on the part of the Secretary to comply with its prorvisions. The person has the right under the act to obtain a warrant from the Secretary of the Interior for the repayment of the excess therein mentioned, and for the purpose of obtaining it he must make his application and prove the facts which the statute provides, and then the Secretary is to draw his warrant on the Treasury. This constitutes the right of the appellant. Applying for the warrant is not a remedy. When application for repayment is made there is nothing to remedy. He has not been wronged. A right of repayment of money theretofore paid has been given by the act, but it is only under the act that the right exists, and that right is to have the Secretary in a proper case issue his warrant in payment of the claim, and until he refuses to do so, no wrong is done and no case for a remedy is presented. After the refusal, the question then arises as to the remedy, and you look in vain for any in the act itself. We can not suppose that Congress intended in such case to make the decision of the Secretary final when it was made on undisputed facts. If not, then there is a remedy in the Court of Claims, for none is given in the act which creates the right. The procedure for obtaining the repayment as provided for in the act must be followed,

> and when the application is erroneously refused, the party wronged has his remedy, but that remedy is not furnished by the same statute which gives him the right."

This applies with equal force to all repayments provided for in the act of March 26, 1908, which as before stated is but supplemental to the Act of 1880.

EXCESS PAYMENT.

Aside from any question of jurisdiction, this case presents the sole question as to whether the requirement that $2.50 per acre be paid by Robert A. Laughlin in perfecting title under the preemption laws to the S½ NW¼ and N½ SW¼ Sec. 33, T. 5 S., R. 12 W., Oregon, was in excess of the amount he was lawfully required to pay under the land laws. If so, repayment of the excess was clearly provided for in Section 2 of the Act of March 26, 1908, *supra*.

The land purchased by defendant in error under the preemption law, fell within the limits of an Executive withdrawal order based upon a map filed by the Northern Pacific Railroad showing the *general route* of its proposed line of road between Walla Walla, Washington, and Portland, Oregon. This map was filed on August 13, 1870, the withdrawal order being made by letter from Commissioner of the General Land Office addressed to the Register and Receiver at Oregon City, Oregon, and dated February 14, 1872. A copy of this order was made an exhibit to the petition filed in this case, and will be found on page 5 of the record.

It will be noted from an inspection of this order that the Register and Receiver were required to withhold from disposition all the *odd-numbered* sections falling within the limits thereof, and to increase in price to $2.50 per acre the *even-numbered* sections within those limits. The line of the North-

ern Pacific Railroad opposite the tract in question was never definitely located or constructed, and the grant appertaining to the unconstructed portion of the road was forfeited by the Act of September 29, 1890, *supra*.

The grant to the railroad company was of the *odd-numbered* sections, and the tract purchased by Laughlin was a part of Section 33, an *odd-numbered* section.

CONTENTIONS.

We therefore contend: *first*, that by the terms of the Northern Pacific Granting Act increase in price was made only of the *reserved alternate* or *even-numbered* sections within the *place or granted limits; second*, that there can be no *alternate reserved sections* until the *odd or granted* sections are fixed as required by the granting act, namely, by the filing of the map of *definite location* of the road; *third*, that as the tract here in question is part of an *odd*-numbered section and is opposite that part of the proposed road which was never *definitely located*, it was neither *granted* nor *increased in price* by the Northern Pacific Granting Act, and as a consequence the claimant was improperly required to pay for the land at the double minimum rate of $2.50 per acre in perfecting title under the preemption laws. In other words, that the land was of the single minimum rate or $1.25 per acre, and he was erroneously required to pay an excess of $1.25 per acre in making title to said lands.

ACTION UPON APPLICATION FOR REPAYMENT BY LAND DEPARTMENT.

As stated in the opinion of the court below, the Secretary of the Interior on June 16, 1913, denied defendant's application for repayment of the excess here in question, erroneously basing his decision upon the ground that the tract in

question was within the *primary* or *place* limits of the grant to the Northern Pacific Railroad on the *definite location* of the company's line of road.

Thereafter, suit was instituted in the Court of Claims to recover the excess payment, but on discovery of the error in the findings of fact by the Interior Department the suit was dismissed on motion, and application made to the Interior Department for the reopening of the case; a proper findings of fact; and a readjudication on such corrected statement. The case was reopened on said application and the Interior Department in its decision of July 22, 1916, copy of which is attached to the petition as Exhibit "A," and will be found on page 4 of the record, corrected its statement of facts, but adhered to its decision denying the application for repayment. In said decision it was found that:

> "No map of definite location was ever filed as to this particular portion of the company's road, it was never constructed, and the grant as to it was forfeited by the Act of September 29, 1890, 26 Stats., 496."

The decision held however, that:

> "The contentions of the applicant are foreclosed against him by the Department's prior decisions in the case of Jesse S. Elliott, (25 L. D., 309), and William F. Brown (35 L. D., 177), and the Department does not feel warranted in disturbing such long-established rule of adjudication."

In the decision of the court below it was said, beginning page 8 of the Record:

> "The long continued and consistent construction given to an ambiguous statute by the department of the Government charged with its administration is not to

be overruled 'except for cogent reasons.' This principle of law is notoriously fundamental, but it can not be invoked in cases where a decision of the Supreme Court subsequently interposes and points out with precision the error of the same, especially so where it appears that the Congress recognized by the passage of remedial legislation the rights of claimants to prefer claims for illegal exactions subsequent to said decisions.

"The plaintiff is entitled now and was entitled before the department to have his case adjudicated under the existing status of the law. He can not be legally foreclosed by reference to decisions without present applicability or by an apparent hesitancy to disturb rulings which upon reexamination possess no greater legal efficacy than age. As a matter of fact the decisions referred to are wholly inapplicable to the present issue. In the Elliott case repayment was applied for under the repayment act of June 16, 1880, the decision was rendered in October, 1897, and was clearly erroneous by the subsequent decision of the Supreme Court in *Nelson v. Northern Pacific Railway*, 188 U. S., 108. The Brown case followed the Elliott case, the decision being announced in September, 1906; again the act of June 16, 1880, was involved, and the Land Office very properly followed the decision of the Supreme Court in Medbury v. United States, 173 U. S., 492. The plaintiff herein preferred his claim under the act of 1908, a statute broader and much more comprehensive in its terms, a repayment act designed to afford relief to claimants, wherein it appears that any payment in excess of the amount lawfully required shall be refunded.

"The case presents the single issue, was the land entered subject to entry under the preemption laws in the face of the grant of the same lands to the railroad company? If so, the legal charge was one dollar and a quarter per acre. It is, of course, quite evident that if by filing the map of general route the railroad company acquired the full extent of its grant, each alternate odd section for twenty miles on each side of its proposed line, then the land entered by the plaintiff belonged to

the company and the entry should not have been received at all, for it was not made until 1878 and the map was filed in 1870; keeping in mind that in any event the plaintiff's entry was part of an *odd*-numbered section and not embraced within the even numbered sections reserved by the Government, which under the law could not be disposed of for less than two dollars and fifty cents per acre.

"In the case of *Nelson* v. *Northern Pacific Railway*, *supra*, decided January 26, 1903, the Supreme Court had under review the granting act of July 2, 1864. In an exceedingly complete and exhaustive opinion, Mr. Justice Harlan went into the very phase of the controversy presented by this record; in fact, the case as there decided was presented to the court from a much more favorable attitude, in so far as the Government is now concerned, than the present one. The facts disclosed that the entryman made his entry subsequent to the filing by the Company of its map of *general route* but prior to its one of *definite location*, and the court held that he could not be divested of his legal title to the land entered, notwithstanding the company completed its line and otherwise occupied the grant. The court said: 'It results that the railroad company did not acquire any *vested* interest in the land here in dispute in virtue of its map of general route or the withdrawal order based on such map; and if such map was not "free from preemption or other claims or rights," or was "occupied by homestead settlers" at the date of definite location on December 8, 1884, it did not pass by the grant of 1864.'

"The lands here in question were under the foregoing decision public lands and open to entry under the public-land laws up to the date of the filing by the railroad company of its map of *definite location*. As concisely stated in the Nelson case, 'until definite location the land covered by the map of general route was a "float"; that is, at large.' "

THE CASE ON THE MERITS.

The minimum or ordinary price required to be paid in perfecting title to lands under the preemption law, is $1.25 per acre, (see Section 2259, U. S. R. S.) By the Northern Pacific Granting Act increase in price was made only of the *reserved alternate* or *even numbered* sections within the *place* or *granted* limits, and there can be no *alternate reserved,* sections until the *odd or granted* sections are fixed by the filing and acceptance of the map showing the *definite location* of the line of the company's road opposite thereto. A map of *general route* was provided for in the Northern Pacific Granting Act but it has been many times held by this court that no rights attached in any lands by the filing of such map, and that the lands remain open to settlement, entry and disposition, until by the map of *definite location* the rights under the grant attached or became fixed or vested in the alternate sections within the limits of the grant as provided.

In the case of Nelson vs. Northern Pacific Railway Company, (188 U. S., 108), this court had occasion to inquire as to the effect of the filing of a map of *general route,* and therein it was held that the Executive order of withdrawal on the map of general route was not required by the granting act, and did not prevent occupancy of any lands prior to the *definite location* of the road.

In that case Nelson had settled after the map of *general route* had been filed and Executive order of withdrawal made thereon. His settlement, however, was before the filing of the map of *definite location,* so that the question there presented, was, did the land, after the *general route* was established, become segregated from the public domain so as not to be subject to occupation prior to the *definite location* of the road. In the discussion of that question, in the course of the opinion, reference was made to the case of St. Paul

and Pacific vs. Northern Pacific (139 U. S., p. 1), wherein it was held that after a map of *general route* was filed, and up to *definite location*, the grant to the railroad company was in the nature of a float, and that land which, previous to definite location had been reserved, sold, granted, or otherwise appropriated, did not pass by the grant of Congress, and also to United States vs. Northern Pacific Railroad Company (152 U. S., 284), and United States vs. Oregon, etc., Railroad Company (176 U. S., 28), which were to like effect.

The last mentioned case involved conflicting claims of two railroad companies to certain lands, and required the court to determine the effect of the filing of a map of general route by the Northern Pacific Railroad Company. In the course of the opinion in that case this court said:

> "If therefore the Perham map of 1865 were conceded for the purposes of the present discussion to have been sufficient as a map of 'general route'—and nothing more can possibly be claimed for it—*these lands could not have been regarded as having been brought by this map (even if it had been accepted), within the grant to the Northern Pacific Railroad Company, etc.*"

Many other decisions of the courts could be referred to fixing the principle that until the *definite location* of the line of the company's road the *limits of the grant* are not capable of identification. This must be readily apparent, because necessarily a mere map of *general route* fixes nothing. If it did, there would be no necessity for a map of *definite location*. There is no limit upon variance that may occur between a map of general route and a later definite location, other than the general limitation on the direction of the proposed road prescribed by the granting act.

We think it can be therefore safely asserted that no lands are brought within the *limits of the grant* on filing of map of

general route; that the law did not authorize withdrawal on maps of general route; that further acquirement of rights within the area traversed were not terminated on the filing of maps of general route; and that the *limits of the grant* are not capable of identification until the map showing the line of *definite location* of the proposed road is filed with and accepted by the Interior Department. It necessarily follows, therefore, that there can be no *place* or *primary* limits of a railroad land grant on a mere map of general route, and that the filing of a map of general route did not prevent disposition of lands falling within its limits under the general land laws and at the ordinary or single minimum price.

This principle is clearly recognized by the decision of the Land Department in what is known as the Kitty Maynard case (27 L. D., 452). In that case the land purchased was within a withdrawal on general route, and it was said:

> 'While the lands entered by Maynard were within the limits of a withdrawal which had not been revoked at the date of his purchase, yet it must be held that the tract purchased had been found not to be within the limits of a railroad land grant."

In this connection however, attention is particularly directed to the fact that the withdrawal here in question, made upon the map of general route, specifically limited the attempted increase in price made thereby to the *even* numbered sections, so that were it conceded that there was authority for the withdrawal on general route, the same could have no effect upon the lands entered by the defendant, being part of an *odd-numbered* section.

This brings us to a consideration of the particular provision in the Northern Pacific Granting Act for increase in price, which is found in Section 6 of said act, and provides:

"And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

WHAT ARE THE RESERVED ALTERNATE SECTIONS?

It is our contention that the "reserved alternate sections" are the *even*-numbered sections within the *primary* or *place* limits of the grant as established on the line of road shown on the map of definite location filed with and accepted by the Interior Department.

We have shown that no public lands were affected by the filing of the map of *general route* of the Northern Pacific Railroad. The *granted lands,* by the terms of section 3 of the granting act, are the *odd*-numbered sections within given limits adjusted to the line of *definite* location. Hence, the *alternate* sections reserved and increased in price must be the sections alternate to the *granted* sections. If this be so, and it is self-evident, then the "reserved alternate sections" must be the *even* numbered sections alternate to the granted or *odd*-numbered sections.

As the grant to the Northern Pacific Railroad never acquired precision by definite location opposite to the tract here in question, the grant in this vicinity never attached. There was never, therefore, in this locality, any *place* or *granted* lands of the Northern Pacific Railroad identified as such, so that *it was impossible for there to have been reserved sections alternate to the granted sections in this locality.*

It was never the purpose to increase the price of the *odd*-numbered or *granted* sections, for by the terms of the granting act the same were to be *withheld from disposition,* as soon as they could be identified, for the benefit of the grant. The 6th section of the granting act provides that "the *odd* sections of land *hereby granted* shall not be liable to sale, or

entry, or preemption before or after they are surveyed, except by said company, as provided in this act."

The "reserved alternate sections" increased in price could, therefore, by no possibility have related to other than the sections alternate to those granted, viz., the *even* numbered sections.

All reasonable doubt in this matter should be dispelled by the action of the Government in its suit against the Southern Pacific R. R. Co. and the decision of this court thereon (228 U. S., 618).

In that case *odd*-numbered or granted sections were disposed of by the company which were held not to have been carried by the grant, although within the *primary* or *place* limits on definite location of the road. In such cases section 4 of the act of March 3, 1887 (24 Stats., 556), protected the purchasers from the railroad company, by giving them a patent from the United States, and provided that thereupon demand be made for payment to the United States, by the railroad company which had disposed of the lands, *"of an amount equal to the Government price of similar lands."*

The Southern Pacific grant is identical to the Northern Pacific grant in the provision for increase in price of the "reserved alternate sections."

If the *odd*-numbered sections within the place or granted limits, but excepted from the grant, were increased in price, then the Government demand should have been made at $2.50 per acre.

The case referred to will show that suit was first instituted for recovery of an amount figured at the rate of $2.50 per acre for the lands patented to the purchasers from the railroad company, but later the suit was amended and the amount reduced to $1.25 per acre.

The court at pages 632 and 633 of its opinion said:

"In the suit which was terminated by the decree entered in 1902, the Government asked that in cases where the purchasers from the Railroad Company were found to have acted in good faith, within the meaning of the adjustment acts, it be decreed entitled to recover $2.50 per acre, *instead of* $1.25 *allowed by the adjustment acts.* While the decree of 1902 determined who were *bona fide* purchasers, contrary to the contention of the Government, it did not pretend to fix the resulting pecuniary liability or embrace affirmative language conclusively protecting against *the enlarged claim which the Government made in the suit.* Under these circumstances, we think it can not be said that such a conclusive liquidation arose or was deemed by the Government to have arisen as to justify an award of interest. This conclusion is also fortified by the fact that when subsequently in 200 U. S., the Government obtained a decree for the price of similar land sold to *bona fide* purchasers, interest was awarded to it only from the date of the decree without apparently objection being made on the part of the United States. This is further fortified by the fact that in the bill in this suit, filed after the decision in 1902, no demand was made for interest.

"Looking comprehensively at the whole situation, especially the decision rendered in 1902, considering that *the withdrawal by the United States of the previously asserted right to greater compensation than the minimum statutory price,* which was a necessary consequence of the filing of its bill in this case, of the averment of demand which the bill contained and the absence of any objection on the part of the defendant company because of prematurity, we think it is just to say that the liability for interest *upon the statutory price* arose at the date of the commencement of the suit and no sooner; and, therefore, that error was committed both in the trial court and in the Circuit Court of Appeals in not confirming the commencement of the running of interest to that date."

How is it possible for the Government now to contend against the claim of this preemption settler that the granting act increased in price the *odd*-numbered or granted sections, which claim it abandoned in its suit against the Southern Pacific R. R. Co.

In this connection we invite especial attention to the instructions issued by the Secretary of the Interior on July 22, 1898 (27 L. D., 241), regarding price to be exacted for the forfeited Atlantic & Pacific Grant. Therein it was said:

> "While some of the lands affected by these instructions fall within the primary limits as described by the grants for the main and branch lines of said Southern Pacific Railroad, ***they are not portions of the alternate sections reserved to the United States by said grants.***
>
> "All of these lands were, by the act of July 6, 1886 (*supra*), forfeited to the United States, and by said act were restored to the public domain. ***The grant to the railroad company did not constitute a reservation within the meaning of section 2364 of the Revised Statutes, and the act of forfeiture did not constitute the bringing of a reservation into market within the meaning of that section.*** What is said to the contrary in Atlantic and Pacific Railroad Company (5 L. D., 269), is overruled. Section 2364 provides that,
>
> > whenever any reservation of public lands is brought into the market, the Commissioner of the General Land Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.
>
> "Lands are only 'brought into market' by a proclamation offering them at public sale, after which they are subject to private sale or entry. This section of the Revised Statutes is taken from the act of July 2, 1864 (13 Stat., 374), entitled. 'An act relating to the sale of reservations of the public lands.' It has no application to any of the lands under consideration, and as they have never been raised in price, they are subject to disposal as ordinary public lands, viz., at $1.25 per acre."

This also removes any possible support to the suggestion in appellant's brief that it was within the power of the Secretary of the Interior, when disposing of this land, to fix a price therefor under Section 2364, U. S. R. S.

This section has had repeated consideration by the Land Department and in another very well considered opinion in case of Mather, *et al.* v. Hackley's Heirs (on review) (19 L. D., 48), it was said, beginning page 54:

> "Section 2364 of the Revised Statutes reads as follows:
>
> "Whenever any reservation of public lands is brought into market, the Commissioner of the General Land Office shall fix a minimum price not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.
>
> "It will be observed that the above recited act is limited in its terms to reservations 'brought into market.'
>
> "The act of 1856, provides that military reservations in Florida, after being placed under the control of the General Land Office, are 'to be disposed of and sold in the same manner and under the same regulations as other public lands in the United States.'
>
> "Now, 'public lands in the United States' are disposed of in various ways. On July 2, 1864, the date of the passage of the act embodied in Section 2364, public lands were disposed of under the homestead and preemption laws, and, when the Commissioner so directed, certain lands were brought into market and sold to the highest bidder.
>
> "Said section being limited by its own terms to the manner of disposition last mentioned, has no application except in those cases where the Commissioner in the exercise of his discretion under the law, had brought lands into the market to be sold at public auction. This construction is obvious unless it be held that the act of 1856, contemplates that no military reservation in Florida shall be disopsed of in any other way than by pub-

lic sale. I am of the opinion that the principle of construction employed in the decision above mentioned. is untenable.

"Under the authority vested in the Commissioner of the General Land Office by the acts of 1846 and 1856, and by section 2364 of the Revised Statutes, he might have brought into market and disposed of the same at public auction, the lands included in the Fort Brooke military reservation; but he was not compelled to do so and up to this time has made no effort to have the same disposed of in that manner. It was legitimate, also to dispose of said reservation under the homestead and preemption laws, and when the same was restored to the public domain, as hereinbefore mentioned, it was subject to entry under said laws. Section 2364 of the Revised Statutes, has no application to the disposition of the same unless the Commissioner of the General Land Office, in the exercise of his discretion, has seen proper to bring said reservation into market."

See also Joseph W. Bilbie, *et al.* (26 L. D., 331).

Were it conceded then that the tract purchased by appellee could properly be considered as one excepted from a railroad land grant, section 2364 U. S. R. S., has no possible application thereto.

ACT OF JUNE 22, 1874.

It is suggested in appellant's brief that the railroad company relinquishd its claim to the land purchased by appellee under the act of June 22, 1874 (18 Stats., 194), which made it possible for the allowance of appellee's preemption purchase. There is nothing in the record to support this statement but accepting it, it advances rather than makes against appellee's claim to the refund on account of said purchase.

The Act of June 22, 1874 (*supra*), provides:

"That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: *Provided*, that nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: *And provided further*, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a pre-emption or homestead settler after the location of the line of the road and prior to the notice to the local land-office of the withdrawal of such lands from market."

The land purchased by appellee was not *granted* the Northern Pacific Railway Company, because no particular land can be said to have been *granted* before its identification as being within the limits of the grant as fixed by the accepted line of definite location of the road. Surely rights do not attach under the grant prior to the definite location of the road.

The line of road opposite this tract admittedly was never definitely located, hence no rights attached to any lands in this vicinity under the grant, and said Act of June 22, 1874, could have no possible application. The company had nothing to relinquish, but if it had the act provides respecting lands so relinquished:

> "And any such entries or filings thus relieved from conflict may be perfected into complete title *as if such lands had not been granted.*"

In the early case of Charles McEwen (1 L. D., 327), it was held that lands relinquished under said act are subject to entry at the minimum price or $1.25 per acre. There it was said, page 328:

> "The act of June 22, 1874, specifically states that the lands relinquished under its terms must be lands *granted* to the road, and when such lands are relinquished by the company, they are relinquished in order that 'the entries or filings may be perfected into complete title as if such lands had not been granted.' I am therefore constrained to decide that the decision of my predecessor in this case was erroneous, and that the entry of McEwen should have been approved without requiring further payment. I have therefore this day approved said entry. There was no formal decision in the Soule case referred to by the attorneys named, the entry evidently having been approved without raising any question as to the price of the land involved."

As a matter of fact this act is specifically limited to an entry allowed subsequently to the time the right of the road was held to have "attached" to the land so entered.

There never was a definite location of the road in this vicinity so no rights ever attached under the grant, but the

act shows that even in the instance named, in relinquishment of the railroad right the odd-numbered or granted section is to be disposed of as if the lands had not been granted.

Surely nothing in said act makes against appellee's right to the refund sought.

But let us go a step further and inquire

WHAT WAS THE PURPOSE OF THE INCREASE IN PRICE OF THE RESERVED ALTERNATE SECTIONS WITHIN THE RAILROAD LAND GRANT?

When grants were first made in aid of the construction of railroads or other internal improvements, the public lands were being disposed of for revenue only, though not upon a basis of actual value. Therefore, the power of Congress to make such grants was seriously questioned, and in order to meet the objections then interposed to the grant, the principle of increasing to double the minimum price, the sections alternate to the granted sections, was introduced. In this way it was proposed to maintain the fund which ordinarily would be received on disposition of the entire body of lands, or both the odd or granted sections and the even or remaining or reserved sections.

In many of the early grants, no designation was made of either the *odd* or *even* numbered sections in the act making the grant, the grant being merely of "alternate sections" within given limits, leaving to the grantee to elect which it would take, the *odd* or the *even* numbered sections, so that the increase in price was made of the alternate reserved sections, being as before stated, the sections alternate to those granted. Later, however, it became general to grant the *odd*-numbered sections, but the sections increased in price were still denominated as the "reserved alternate sections," meaning necessarily, as before, the sections alternate to those granted.

In this locality, as before shown, the grant never attached or became fixed because this could only occur on definite location of the road, and there was never any definite location. There was therefore no reason for an increase in price, as nothing was granted, *i. e.*, no grant ever attached.

We have then no identification of any sections granted the Northern Pacific Railroad Company in this vicinity, so that there could be no sections alternate to those granted, and therefore no reason for an increase in price of *any* lands on account of the grant, as the grant never attached or became fixed.

The projected line of the Northern Pacific Railroad, provided for in the granting act, comprehended the building of a railroad via the valley of the Columbia River, the boundary line between the State of Oregon and the then Territory of Washington, to Portland in the State of Oregon. The portion of the projected line between Walla Walla, Washington, and Portland, Oregon, was never definitely located or constructed, and the grant appertaining thereto was forfeited by the act of September 29, 1890, *supra*.

Although no grant ever attached, or became fixed, between the points named, the Government disposed of the entire area, *both the odd and even numbered sections*, as fixed by its withdrawal on the mere trial line or map of general route.

Had the grant been earned, or even become fixed or located, between said points, the *odd*-numbered sections or *granted* sections would thereby have been disposed of, and this would have furnished a reason for the increase in price of the sections alternate to the granted sections or the *even*-numbered sections, but as there was no grant, there was no reason for increasing the price of *any* of the sections. It results, however, that the Government recouped from the public for the failure of the company to make location of its road, by raising in price and disposing of *both odd and even numbered sections at the increased price*.

FOUNDATION FOR DEPARTMENTAL DECISION.

Let us look then to the decisions rendered in the Interior Department and relied upon as sufficient to support its action in denying repayment to this claimant.

The cases cited in the departmental decision of July 22, 1916, are James S. Elliott (25 L. D., 309), and William F. Brown (35 L. D., 177). The first was decided October 5, 1897, and the second September 26, 1906.

Each was an applicant for repayment of an excess payment on account of an entry which had passed to patent.

At the time said decisions were rendered the only repayment act in existence was the act of June 16, 1880, *supra*, and in our opinion these cases were clearly repayable under that act, because *the lands were never within the limits of a railroad land grant,* there having been no definite location of the road opposite thereto.

In Buttz vs. Northern Pacific Railroad Company (119 U. S. 55), certain expressions are found recognizing a right under the grant on the filing of the map of general route; however, these expressions were unnecessary as the conclusion reached was rested on an entirely different ground. Further, this matter has since been fully clarified by the later decisions of the Supreme Court, and it is now clear (a), that no rights attached or became vested under the grant on the map of general route, and (b), that the map of general route did not define the limits of the grant. (See United States vs. Northern Pacific R. R. Co., 152 U. S., 284, 296, 298; United States vs. Oregon, &c., R. R., 176 U. S., 28, 43, and Nelson vs. Northern Pacific R. R. Co., 188 U. S., 108, 118, 120, 121).

All possible doubt as to claimed rights on map of general route are removed by the full, clear, and comprehensive decision of this Court in the Nelson case (*supra*). This opinion was rendered in 1903, and should have made clear the

right to repayment in lands having the status of those here before the court. However, in the Brown case, decided in 1906, the Interior Department on a reference to the decision of the Supreme Court in the Medbury case (*supra*), adhered to its decision in the Elliott case without even a reference to the decision in the Nelson case and allied adjudications.

THE MEDBURY CASE.

We submit that the facts in the Medbury case are widely different from those in the case at bar, and that this difference furnished the basis for that decision.

It was said at page 499 of the opinion of the court in the Medbury case:

> "It is conceded by the appellant that at the time the entry was made and the double minimum price paid for the lands, they were within the place limits of the grant to the Wisconsin Central Railroad. The payment therefore was a proper payment, and necessary to have been made in order to obtain the lands. There was no mistake or misunderstanding of the facts at the time the entry was made. It was made eight years after the passage of the land grant by Congress, March 5, 1864, and at the time the payment was made the railroad had not been built. The Government of course was no guarantor that the railroad ever would be built, and the party thus making entry of lands within the *place* limits of a railroad grant necessarily took his chances of the future building of the road. That it was not certain to be built was sufficiently apparent at the time of the entry, for eight years had then elapsed, and no road had been built at that time. It was not until eighteen years after the entry, viz., in 1890, that the Government finally forfeited the lands because of the failure of the company to build the road. With reference to these facts, we think that the construction placed upon *the*

act of 1880 by the Secretary of the Interior is the correct one.

"The Secretary decided that the act does not apply to a case such as this, where at the time of the entry the lands were within the limits of the railroad land grant, and so continued for eighteen years, and where it was only by the failure of the railroad company to build the road and the forfeiture of the land grant by the Government consequent upon such failure that the land *then ceased to be within such limits.*

"Whatever may have been the reason of Congress in making the charge of $2.50 per acre the minimum price for alternate sections along the line of railroads within the *place* limits of the grant, the meaning of the act of 1880 is not in anywise affected thereby. That act plainly referred to the case of a mistake in location at the time when the entry was made. Where the parties supposed that the land entered was within the limits of the land grant, and where subsequently it is discovered that the lands were not within those limits, that a mistake had been made, and that the party had not obtained the lands which he thought he was obtaining by virtue of his entry, then the act of 1880 applies.

"Here no mistake whatever has been made. The lands were *within the limits of the land grant* at the time of the entry, and so remained for many years and up to the time of the act of forfeiture by Congress. Whether the railroad would fulfill its obligations and in good time build its road through the land grant was a matter which the future alone could determine, was a matter which the entryman could judge of as well as the Government, and was a matter in regard to which the Government gave no guaranty, express or implied. Hence when in subsequent years the company failed to build its railroad within the limits of the land grant at this point, and the same was forfeited, the Government was under no obligations whatever by virtue of the act of 1880 or otherwise to repay the difference in price for these lands."

The grant to the Wisconsin Central Railroad was of the *odd* numbers and the land purchased was part of an *even*-numbered section, therefore a "reserved alternate section."

Note also the repeated statement that the lands paid for were admitted to be within the *place* limits of the railroad grant, and that the charge *was a proper one, when paid* in the entry of the lands.

There was never a map filed by the Wisconsin Central Railroad as a map of *general route,* but a map of *definite location* was filed by said company, on which the grant *attached* and the *limits* of the grant were *thereby fixed,* and a later construction of the road could not have changed those *limits* even had the *constructed line* differed from that shown on the map of *definite location.*

The sole basis for the claim to repayment in the Medbury case was the fact that the grant was never earned by the construction of the road, and was for that reason forfeited.

Here the land paid for was of the *odd*-numbered or granted sections. Further, it is here conceded that the lands were never at any time in the *place* limits of the grant, for there could be no *place limits* prior to the definite location of the road.

It is true in the case now before the court the grant was later forfeited opposite unconstructed road, but this fact is referred to by us, *not as wiping out the limits of the grant,* but merely as terminating all rights under the granting act; so that *thereafter* there could be no *definite location* of the road, through the operation of which the lands might *then* be brought within the *limits of the grant.*

The Elliott Case.

The Elliott case above referred to was, after rejection of the application by the Secretary of the Interior, carried to the Court of Claims on petition filed, and the matter was the

subject of opinion reported in 37 Ct. Cls., page 306. By said decision the petition was dismissed. That case involved part of an *even*-numbered section, and in that respect is materially different from the case now before the court.

Again, when that case was before the court, the holding made by the Supreme Court in the Butts case, *supra*, to the effect that a legislative withdrawal followed the filing of the map of general route, had not been repudiated by the later decisions ending in the Nelson case, *supra*.

The only question raised by the argument in that case was whether the limits were properly adjusted to the line of general route, the location having been within the then Territory of Washington, and the lands, the subject of that suit, being within the La Grande land district, in the State of Oregon, and more than *twenty* miles distant from the boundary line between the two States. *The case thus presented was one of fact respecting which the finding of the Interior Department was held controlling.*

It will thus be seen that the matters brought to the attention of the court in the present case were not discussed or adverted to either in the argument or the decision rendered in that case.

Since the decisions in the Brown and Elliott cases the repayment act of 1880 has been supplemented by the act of March 26, 1908 (*supra*); and if the requirement made for repayment by Laughlin at the rate of $2.50 per acre, in completing title is viewed merely as an excess payment, it can now be repaid under the provisions of the said act of 1908, although it could not have been repaid as a mere excess payment at the time the decisions were rendered by the Interior Department in the Brown and Elliott cases.

ADMINISTRATION OF INTERIOR DEPARTMENT NOT UNIFORM.

We wish to impress upon the court that the administration of the Interior Department has not been uniform regarding the price exacted for lands within the Executive withdrawal on general route, nor with respect generally to *odd*-numbered or *granted* sections within the place or granted limits of railroad land grants, but excepted therefrom.

In the particular area here involved, being the portion of the projected line of the Northern Pacific Railroad between Walla Walla, Washington, and Portland, Oregon, which was never definitely located nor constructed, and respecting which the grant has been forfeited, in much the larger part of the *odd*-numbered sections, a price of only $1.25 per acre was exacted, although $2.50 per acre was demanded of this claimant.

Again, with respect to the *odd*-numbered or granted sections within the Northern Pacific Railroad grant and opposite road definitely located, the ruling has changed from time to time.

In Northern Pacific Railroad Co. v. Yantis, 8 L. D., 58, the question of the price to be exacted in completing title to *odd*-numbered sections within the place or granted limits was specifically considered and ruled upon; and it was held that such *odd*-numbered sections were to be disposed of at $1.25 per acre, the increase in price to $2.50 per acre being limited to the *even* or the "reserved alternate sections."

To the same effect is the decision in Catlin vs. Northern Pacific Railroad Co., 9 L. D., 423.

An actual examination of disposals made of *odd*-numbered or granted sections within the limits of the several land grants would disclose an utter lack of uniformity in price, in some instances only $1.25 per acre being exacted, while in others $2.50 per acre was demanded and paid.

Again, in numerous decisions the Interior Department has held that the increase in price of the alternate reserved lands takes effect upon *definite location.*

See—

J. Garaghty, 1 L. D., 524.
John Baxter, 11 L. D., 99.
David K Emmons, 35 L. D., 159.
Thomas Emanuelson, 37 L. D., 687.

In Conclusion.

We have shown:

(1) That the tract here involved is part of an *odd*-numbered section, and in completion of title thereto under the preemption laws claimant was required to pay at the rate of $2.50 per acre, or double the minimum price, notwithstanding the granting act did not provide for the increase of the price of the *odd*-numbered sections under any conditions;

(2) That while the tract fell within the limits of an executive withdrawal made on the map filed by the Northern Pacific Railroad Company showing the line of general route of its proposed railroad, the road was never definitely located or constructed opposite thereto; that the grant has been forfeited opposite unconstructed road; that the executive withdrawal on general route has been adjudged by the Supreme Court of the United States not to have been authorized by law, and that said withdrawal merely ordered increase in the price of the *even*-numbered sections;

(3) That the Northern Pacific granting act merely increased in price the "alternate reserved sections," being the sections alternate to those granted, or the *odd*-numbered sections; that the granted sections can not be located before the definite location of the railroad, which never occurred in this vicinity, and it follows as a consequence that there were

no "alternate reserved sections" in the locality of the land in question;

(4) That the increase in price was to reimburse the United States for the sections given or carried by the grant; that as no grant ever attached in this locality on definite location of the road there was no necessity for increasing the price of any lands on account of this part of the grant, and

(5) That the administration of the Interior Department in the matter of fixing prices has not been uniform.

In any view of the case, therefore, the requirement that this claimant pay for this land at the double minimum rate was unauthorized, the land being properly of the single minimum class unaffected by the Northern Pacific land grant, and it follows that he made "payment to the United States under the public-land laws in excess of the amount he was lawfully required to pay under such laws," and he is therefore entitled to judgment for such excess payment.

It is therefore respectfully submitted that there is no error apparent in the record and that the judgment of the court below should be affirmed.

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